Montana Independent Telecommunications Systems

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January 2, 2004

<u>EX PARTE - VIA ELECTRONIC FILING</u>

Ms. Marlene H. Dortch
Secretary, Federal Communications Commission
445 Twelfth St, SW
Washington, DC 20554

Re: <u>Written ex parte presentation</u> in
CC Docket No. 96-45

Dear Ms. Dortch:

Montana Independent Telecommunications Systems (MITS) represents telecommunications companies whose service areas span the state of Montana as well as parts of North Dakota, Wyoming and Nevada.[1] MITS has been an active participant in the Montana Universal Service Task Force (MUST),[2] which has filed extensive comments in this docket.[3] The purpose of this letter is to suggest public interest criteria to be applied to carriers seeking ETC designation and annual certification in areas served by rural telephone companies. This written ex parte is being filed electronically in accordance with Commission Rules.

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[1] MITS' members include Central Montana Communications, InterBel Telephone Cooperative, Nemont Telephone Cooperative, Northern Telephone Cooperative, Project Telephone Company, Triangle Telephone Cooperative Association, and Valley Telecommunications, all headquartered in Montana, as well as CC Communications, headquartered in Fallon, Nevada.

[2] MUST is a group of rural telecommunications providers concerned about the preservation of true universal service in rural America. The companies include Montana Independent Telecommunications Systems, Valley Telecommunications, Inc., Triangle Telephone Cooperative Association, Inc., Project Telephone Company, Inc., Northern Telephone Cooperative, Inc., Nemont Telephone Cooperative, Inc., Interbel Telephone Cooperative, Inc., Central Montana Communications, Inc., 3 Rivers Telephone Cooperative, Blackfoot Telephone Cooperative and C. C. Communications.

[3] For example, see comments filed on April 14, 2003, May 5, 2003, and June 3, 2003.

Summary

The Telecommunications Act of 1996 introduced the concept of "eligible telecommunications carrier" (ETC) into the Federal Universal Service program (USF).[4] Pursuant to the '96 Act, a telecommunications carrier, prior to receiving any USF support for a particular service area, must first be designated as an ETC by the appropriate state commission. The Act further requires state commissions, before designating an additional ETC for an area served by a rural telephone company, to find that the designation is in the public interest.[5, 6]

MITS and its member companies are greatly concerned that the wholesale designation of additional ETCs in rural areas may not always be in the public interest. The term "public interest" is currently not defined in statute or by rule for the purposes of ETC designation. Therefore, to ensure uniform application of public interest standards, MITS urges the Federal-State Joint Board on Universal Service to recommend that the FCC establish uniform minimum thresholds against which ETC applications can be measured. The establishment of minimum standards for ETC designation will provide guidance to states in their consideration of public interest determinations. Further, in our view, states should be free to establish public interest criteria beyond the threshold established by the FCC in order to address unique circumstances on a state-by-state basis.

MITS and its member companies are concerned that, absent minimum standards to evaluate whether new applications for ETC designation are in the public interest, the quality of universal service to telecommunications consumers in rural America may be degraded. MITS is further concerned that financial demands may be made upon the federal Universal Service Fund that endanger the continued viability of that fund.

For these reasons, MITS proposes the following guidelines for designation and annual certification of ETCs.

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[4] 47 U.S.C. Section 214(e)(1).
[5] See 47 U.S.C. Section 214(e)(2).
[6] Rural telephone companies are those that as of the passage of the '96 Act served an area which did not contain any incorporated place of 10,000 or more inhabitants; or provided telephone exchange service to fewer than 50,000 access lines; or provided telephone exchange service to fewer than 100,000 access lines in a study area; or had less than 15% of its access lines in communities of more than 50,000 inhabitants. (See 47 U.S.C. Section 153(47).).

Eligible Telecommunications Carrier Designation and Certification Guidelines.

For areas served by rural telephone companies, state commissions shall determine on a case-by-case basis whether an application for ETC designation is in the public interest. Such designation shall not be deemed to be in the public interest unless the application meets the following minimum criteria:

(1) Cost/Benefit Analysis. State commissions must find that the economic benefits, including but not limited to the economic benefits of competition, of designating an additional ETC exceed the economic costs, including but not limited to demands upon any state or federal universal service fund of supporting an additional ETC for the service area(s) included in the application.

Rationale: Rural service areas vary widely in terms of subscriber density, terrain and other factors that in turn affect the per-line support received by the incumbent ETC. Generally speaking, areas with very low population densities tend to have greater costs per subscriber and the incumbent provider receives higher levels of USF support than those serving areas with greater population densities. The kind of economic analysis described above ensures that the benefits of multiple ETCs (and therefore of competition) in these very sparsely populated areas truly offset the very significant additional burdens placed upon state and federal USF where per line support is also high. For example, the designation of additional ETCs in areas where the incumbent receives only a few dollars per line might survive such economic analysis quite easily because the additional burden on the USF may be clearly outweighed by the benefits of competition. The cost/benefit analysis for a new ETC may not be quite so clear where the incumbent is receiving $30-$40 per line per month and both the incumbent and competitive ETCs are receiving that amount for the same household or business. In the latter case, the benefits of competition may not, in the judgment of the state commission outweigh the very significant additional burdens on the USF.

This kind of economic analysis should also examine the economic costs and benefits to consumers in the affected rural service area if the designation of additional ETCs appears likely to affect the incumbent's ability to continue to meet carrier-of-last-resort responsibilities or its ability to continue to make investments in a robust, scalable technology platform.

(2) Coverage. Carriers applying for ETC designation in areas served by rural telephone companies must provide a plan, acceptable to the state commission, showing the manner in which the entire service area for which designation is sought will be served no later than two (2) years from the date of ETC designation. This showing shall include at a minimum a commitment by the applicant to provide to the commission, at the applicant's expense, an engineering study by an independent engineering firm at the end of each year following the date of the commission's order designating the applicant as an ETC for the study area(s) at issue. To retain designation, the carrier's voice communications service must be accessible by 80% of the homes and businesses in the service area at the end of year one and 98% at the end of year two. By "accessible," this guideline means that the indicated percentage of homes and businesses must be able to utilize the designated carrier's services from their home or business locations at a level of service quality commensurate with the level of service quality and standards set forth herein. In the case of a wireless carrier, "accessible" further means that the subscriber must not be required to purchase any equipment beyond a typical handheld mobile phone that may be required to enhance the ability to transmit or receive the wireless carrier's communications service.

Rationale: The FCC's South Dakota Declaratory Ruling[7] clearly stated that the provision of service throughout 100% of a rural telephone company's service area is not a prerequisite to ETC designation. However, the Ruling did require the applicant to manifest an appropriate degree of intent to provide service throughout the service area. The rationale for not requiring full coverage prior to designation was that investors would need to know whether their venture would receive ETC designation before they could be expected to make the necessary investments to provide such coverage.

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[7] CC Docket 96-45, FCCC 00-248 Declaratory Ruling released August 10, 2000, In the Matter of the Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission.

Considering that designation for a single service area in many cases represents millions of dollars in revenues to the applicant, once designation has occurred, state commissions should expect that the competitive provider will not dally in meeting the clear mandate of the '96 Act that a provider of universal service actually provide service that is universal. A strict build-out requirement is necessary to show state commissions that the investors are truly committed to providing universal service and are not simply seeking designation to take advantage of a financial windfall by either "cherry picking" or by reporting customers that exist at the time of designation with no intent to make the investments necessary to reach the remainder of the customers in the service area. An open-ended build-out requirement frustrates Congress' clear intent as expressed in the '96 Act that ETCs provide service throughout the entire rural service area.

Further, in a competitive environment, the incumbent may become insolvent or may choose to withdraw as the carrier of last resort. State commissions must have confidence that in such an event significant percentages of subscribers are not left without quality phone service, reasonably comparable to phone service in urban areas, simply because the competitor chose not to use USF funding to invest in the infrastructure necessary to provide ubiquitous service.

(3) Network Congestion. Subject to Guideline (4), below, the commission must find, based on evidence provided by the carrier applying for ETC designation, including but not limited to engineering studies, facilities diagrams, equipment specifications, and expert testimony, that the applying carrier's network capacity is capable of providing communications services to customers without blocking or dropping calls due to network congestion or inadequate facilities below a certain threshold. For the purposes of these guidelines, that threshold shall be an average of no more than one (1) blocked or dropped call in 100 during the average busy hour of the ten (10) highest calling traffic days of the four (4) highest calling traffic weeks of the four (4) highest calling traffic months of the year for the 12 months immediately preceding the application for ETC designation.

(4) Supplemental Proceedings. The commission may grant ETC designation to an applicant notwithstanding such applicant's inability to show that it meets the provisions of Guideline (3) at the time of the application. However, in such cases a supplemental proceeding must be commenced within one year following designation, and the commission shall withdraw the applicant's ETC designation if the carrier is unable to prove to the commission's satisfaction that it meets the criteria set forth in Guideline (3) at the time of the commencement of the supplemental proceeding. Such proceeding shall be concluded within 90 days of filing.

Rationale for Guidelines (3) and (4): A communications network is of little if any value if a communication across that network from point A to point B cannot be reliably accomplished. The network congestion standard set forth in Guideline (3), above, is the standard to which the vast majority of rural ILECs are held by the terms of Rural Utility Service (RUS) requirements[8]. It is therefore the standard to which a substantial majority of rural subscribers have become accustomed. Rural subscribers should be able to expect that all of their calls (and especially those of an urgent or emergency nature) will be able to traverse the network with the same degree of reliability to which they have long been accustomed, regardless of which ETC is providing the service.

If a carrier is seeking to receive potentially millions of dollars in support for a particular service area, the state commission should be able to expect calls to be completed without unreasonable blockage due to network congestion. If a particular provider intends to market a service that does not meet these congestion standards, the provider should be free to do so as a competitive service offering. That provider should not, however, be eligible for potentially millions of dollars in universal service support for such an offering.

The Supplemental Proceedings guideline recognizes that some prospective ETCs may not have been measuring network congestion prior to their application for ETC designation. This guideline allows for a transitional period of time for such ETCs to revise internal procedures and records as necessary for them to meet the Network Congestion guideline.

(5) Cost Reporting and Annual Certification. The National Exchange Carriers Association (NECA) requires its members to file a universal service fund report (Data Collection Form), an example of which is attached to this filing as Exhibit A. The report allows NECA to track the expenditure of universal service funds and to ensure those expenditures are consistent with the purpose of the fund.

(a) State commissions should require all ETCs to submit reports modeled after the NECA report (Data Collection Form), regardless of whether the ETC is a NECA member, so that the state commission can ensure funds are being properly expended. (b) Any ETC failing to submit such a report should be denied certification by the state commission to continue to receive universal service funds. (c) Further, upon reviewing and investigating the contents of these reports, state commissions should determine that universal service funds received by an ETC are directed in reasonable proportion to investments and expenditures associated with the specific geographic service area or study area for which the funds are received. The commission should not certify an ETC to continue to receive universal service funding absent such a finding.

Rationale: It is not fair from either a cost perspective or a competitive neutrality perspective to impose cost reporting requirements on incumbent ETCs but not on competitive ETCs. Further, state commissions should have some reliable evidence that universal service funds are being expended by CETCs for appropriate purposes as part of their annual certification process. A reasonable proportion of the funding should be dedicated to the service area for which the funding is received in order to ensure that the funds are being utilized to advance the principles set forth in the '96 Act.

(6) Service Quality Standards. In addition to the requirements set forth in the preceding guidelines, as a prerequisite for ETC designation, state commissions should require ETC applicants to agree to be bound by any service quality standards already set forth for incumbent local exchange carriers in the individual state, either by rule or state statute, with the following exceptions: (a) Where an existing standard is lower than one of the standards set forth above, the higher standard should apply, (b) Carriers not otherwise required to file tariffs in a particular state should not be required to file tariffs simply as a result of complying with service quality standards, and (c) Wireless ETCs should have the same service quality obligations as wireline local exchange carriers except in cases where a particular rule clearly applies only to a wireline technology platform, in which case a comparable standard for wireless technology platforms should be established by the state commission so that comparable standards apply regardless of the technology platform.

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[8] See, for example:
http://www.usda.gov/rus/telecom/publications/word_files/1753e001.doc; and

Rationale: When faced with competition, the incumbent ETC may be able to continue to operate. It is also possible that the incumbent (a) may be forced from the market; (b) may voluntarily withdraw from the market; or (c) may withdraw from its ETC obligations. State commissions must then be confident that telephone subscribers continue to receive telecommunications service of a quality at least comparable to that they received from the incumbent.

This guideline does not constitute a barrier of entry to competitive carriers because competitive carriers are not precluded from providing service that falls short of ETC service quality standards. Such service should simply not be eligible for universal service funding. Neither incumbent nor competitive carriers should receive universal service funds if they fail to meet minimum ETC service quality standards.

Conclusion

The Telecommunications Act of 1996 requires state commissions, before designating an additional ETC for an area served by a rural telephone company, to find that the designation is in the public interest. However, public interest as it applies to ETC designations has never been defined either by statute or by the FCC. MITS is concerned that the lack of a minimum guidelines such as those contained herein will lead to the degradation of service quality in rural areas and the excessive, unsustainable growth in the size of the fund.

MITS respectfully urges the Joint Board to recommend to the FCC that it adopt the guidelines provided herein for the designation and certification of ETCs in areas served by rural telephone companies. The consistent application of such guidelines by state commissions should help to preserve the high level of service quality that currently exists in rural America.

Respectfully submitted,

Michael C. Strand
Chief Executive Officer and General Counsel
Montana Independent Telecommunications Systems
(MITS)

Attachment: NECA Data Collection Form